In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 799

CHARLES H. PARSONS, INDIVIDUALLY AND AS PRESIDENT OF THE UNITED TELEPHONE ORGANIZATIONS, ETC., PETITIONER

v.

PAUL M. HERZOG, JOHN M. HOUSTON, JAMES J. REYNOLDS, JR., ABE MURDOCK, AND J. COPELAND GRAY, INDIVIDUALLY AND AS MEMBERS OF THE NATIONAL LABOR RELATIONS BOARD AND ROBERT N. DENHAM, INDIVIDUALLY AND AS GENERAL COUNSEL OF THE NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals, not yet officially reported, appears at pp. 23–32 of the record. The opinion of the District Court, likewise not officially reported, appears at pp. 16–18 of the record.

JURISDICTION

The judgment of the Court of Appeals (R. 33) was entered on February 20, 1950. The petition for a writ of certiorari was filed on May 4, 1950. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Petitioner, having filed charges alleging that unfair labor practices within the meaning of Section 8 (b) (4) (D) of the Act were being committed incident to certain jurisdictional disputes, the General Counsel of the Board conducted a preliminary administrative investigation which revealed that the charges were unsupported by sufficient evidence to warrant further proceedings. The question presented is whether, in these circumstances, the Board was required by Section 10 (k) of the Act to hear and determine the jurisdictional disputes, although they had given rise to no unfair labor practices.[1]

[1] In essence, the petition for certiorari is limited to this single question (Pet., p. 2). Petitioner's supporting brief specifies, however, that the Court of Appeals not only decided this question erroneously, but also erred in holding that the District Court was without jurisdiction of the subject matter, and that the complaint failed to state a cause of action (Br., pp. 2–3). Since, as petitioner concedes (Br., p. 3), "the latter two specifications of error arise out of the first specification of error" because the conclusions of the Court of Appeals thereon followed "solely as a result of its construction of Section 10 (k) of the Act (R. 24, 32)," we shall not treat these subsidiary questions in the body of our brief. See n. 6, p. 13, *infra*.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. II, 141, *et seq.*) are set forth in the Appendix *infra*, pp. 15–21.

STATEMENT

On January 31, 1949, petitioner filed a complaint in the District Court against the individual members of the National Labor Relations Board and its General Counsel (R. 1–7). The principal allegations of the complaint may be summarized as follows:

1. On or about September 2, 1947, the United Telephone Organizations (hereinafter called "UTO"), by petitioner, its president, filed a charge with the Regional Director of the Board for the Second Region, reciting that it was filed "pursuant to Section 10 (k)" of the Act, and alleging that Local 3 of the International Brotherhood of Electrical Workers, A. F. of L. (hereinafter called "Local 3") was engaging in unfair labor practices within the meaning of Section 8 (b) (4) (D) of the Act (R. 2–3, 8–9). The charge specified that Local 3 was engaging in a concerted refusal "to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials or commodities or to perform any services in connection with conduit and telephone installations at the Idlewild Airport" in New York City, an object thereof

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being to force "the New York Telephone Company to assign particular work to * * * members of Local 3" rather than to employees of the Company, who were members of UTO. The charge further set forth that Local 3 threatened to have all of the A. F. of L. building trades unions "withdraw all of their members from work at the Idlewild Airport * * * if such conduit or telephone installations were erected" by UTO. (*Ibid.*)

2. On or about September 18, 1947, UTO filed a second charge with the Regional Director, alleging identical conduct by Local 3 in connection with construction work at various housing projects in New York City (R. 3–4, 10–11).

3. On August 18, 1948, the Regional Director advised UTO that the above charges had been "carefully investigated and considered," and that, as "a result of the investigation, it does not appear that there is sufficient evidence of violations to warrant further proceedings at this time." Accordingly, the Regional Director refused to notice for hearing the jurisdictional disputes underlying the alleged unfair labor practices (R. 4, 12).

4. UTO thereupon appealed the Regional Director's ruling to the General Counsel of the Board, who likewise concluded that "there is insufficient evidence to warrant further proceedings" (R. 4, 13).

5. The General Counsel's decision was then appealed to the Board, which denied the appeal on the grounds that (a) the Board "is without authority to review actions of the General Counsel in refusing to issue complaints"; (b) the Board "is of the opinion that a hearing under the provisions of Section 10 (k) of the Act is not mandatory and that the Regional Director upon completion of investigation properly refused to issue a notice of hearing" (R. 4–5, 14).

The gravamen of the complaint was that, because Section 10 (k) of the Act required the Board, whenever a charge was filed alleging a violation of Section 8 (b) (4) (D), to hear and determine the dispute out of which the violation shall have arisen, it followed that the Board, in making this formal step contingent upon the outcome of an investigation into the *prima facie* merit of the charge, failed to perform the mandatory duty imposed by Section 10 (k); and that this action was causing UTO "irreparable damage" for it deprived UTO of the "right to a hearing" guaranteed by Section 10 (k) (R. 5–6). The complaint prayed that the individual members of the Board be compelled to hear and determine the jurisdictional disputes in question (R. 6–7).

On March 31, 1949, the Board filed a motion to dismiss the complaint, on the grounds that (a) the District Court was without jurisdiction of the

subject matter of the action; and (b) the complaint failed to state a claim upon which equitable relief could be granted (R. 15). On June 16, 1949, the District Court, after oral argument, entered an order denying the Board's motion to dismiss (R. 16). The court rendered an oral opinion supporting its order (R. 16–18), in which it construed Section 10 (k) "to require the National Labor Relations Board to afford a hearing to persons making charges of this kind" (R. 18).

On June 27, 1949, the Board filed a statement of election not to plead further in the cause, and requested that the District Court, upon entry of final order, also "enter an order staying execution of the same pending appeal" (R. 18). On July 14, 1949, the District Court entered an order directing the Board to hear and determine the jurisdictional disputes "arising out of the charges" filed by UTO, and at the same time stayed execution of its judgment pending appeal by the Board (R. 19–20).

On February 20, 1950, the Court of Appeals unanimously reversed the decision of the District Court, and remanded the case to that Court with instructions to dismiss "for lack of jurisdiction over the subject matter and for failure of the complaint to state a cause of action" (R. 33). In its opinion (R. 23–32), the court, after detailed analysis of the purpose of Section 10 (k) and the relation between it and other provisions of the Act, concluded, *inter alia,* that this pro-

vision did not insulate 8 (b) (4) (D) charges from the preliminary screening procedure applicable in respect to all other unfair labor practice charges. Accordingly, the Board's duty under Section 10 (k) to hear and determine jurisdictional disputes became operative, not upon the mere filing of an 8 (b) (4) (D) charge, but only after preliminary investigation of the charge disclosed reasonable cause to believe that it was true.

ARGUMENT

Petitioner's contention that the Board is required by Section 10 (k) of the Act to hear and determine a jurisdictional dispute, despite the absence of even *prima facie* evidence that such dispute has resulted in an unfair labor practice under Section 8 (b) (4) (D) of the Act, presents no substantial question warranting review by this Court.

1. Petitioner's argument rests upon the fallacious assumption that the Board is authorized by Section 10 (k) to hear and determine jurisdictional disputes, as such, without regard to whether those disputes have given rise to the strikes or boycotts proscribed by Section 8 (b) (4) (D). The assumption is refuted by the express language of Section 10 (k) which empowers the Board to determine only those disputes out of which unfair labor practices "shall have arisen".

The assumption is also inconsistent with the fact that, as petitioner concedes (Br., p. 16),

Section 10 (k) is merely an ancillary remedy for violations of Section 8 (b) (4) (D). That subsection is part of Section 10, entitled "Prevention of Unfair Labor Practices." The function of Section 10 (k) is to provide a method for remedying the unfair labor practices by resolving the underlying dispute (S. Rep. No. 105, 80th Cong., 1st Sess., pp. 8, 27). To invoke the Board's jurisdiction under that subsection a charge must be filed alleging that a violation of Section 8 (b) (4) (D) has been committed. If the procedures under 10 (k) are unsuccessful in eliminating the unfair labor practice, the same charge serves as the basis for further proceedings, *i. e.*, the issuance of a complaint under Section 10 (b), and the issuance of a preliminary injunction under Section 10 (l). Indeed, while the procedures under Section 10 (k) are pending, the Board may apply for temporary injunctive relief against the unfair labor practice under Section 10 (l). Thus, as the court below stated (R. 26): "The existence of an unfair labor practice within the meaning of Section 8 (b) (4) (D), is a *sine qua non* to the Board's power to hear and determine [jurisdictional disputes]."

Petitioner's contrary construction of Section 10 (k) rests upon abstraction of the words "Whenever it is charged, * * * the Board is * * * directed to hear and determine" from the remainder of the Section and from the statute as a whole. As the court below pointed

out, to adopt petitioner's construction would necessitate (R. 26) "rewriting that section to read 'the Board is empowered and directed to hear and determine the dispute out of which the *charge* shall have arisen'."[2] That construction would result in requiring the Board to hear and determine jurisdictional disputes even though the dispute arose in an industry outside the Board's jurisdiction, and even though the labor organization named in the charge had engaged in no strike or boycott whatever, or in a strike or boycott which was not an unfair labor practice because the union possessed a Board certification.[3] Moreover, petitioner's construction would result in compelling the Board to decide jurisdictional disputes in cases where, as in the instant case, its determination could not be vindicated by the supplementary complaint and injunction remedies of Sections 10 (b) and (l).

[2] Indeed, petitioner's complaint was premised upon the theory that it is the filing of the charge which creates the dispute (see R. 4–5, pars. 12, 18, 19). The relief sought was that the Board "be required to hear and determine the disputes arising out of the * * * charges * * * filed by the plaintiff * * *" (R. 6). This was the theory apparently adopted by the District Court, which, in the judgment reversed by the court below, directed the Board "to hear and determine the dispute arising out of the unfair labor practice charges filed by the [petitioner]" (R. 19).

[3] Section 8 (b) (4) (D) specifically *permits* strikes and boycotts in furtherance of a jurisdictional dispute, where the "employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work."

Having made the determination, the Board would have no alternative but to dismiss the charge, despite the express provision of Section 10 (k) that dismissal shall occur "upon compliance by the parties * * * with the decision of the Board." As the court below observed (R. 29), "We cannot subscribe to a construction of the statute which would lead to such irrational results."

2. Petitioner's contention that the Board is not empowered to conduct a preliminary investigation into charges alleging violations of Section 8 (b) (4) (D) before conducting a hearing and making a determination of the underlying jurisdictional dispute rests entirely upon the absence of a provision in Section 10 (k) authorizing such investigation. But the power to conduct preliminary investigations of *all* charges filed pursuant to Section 10 is clearly conferred by Sections 3 (d) and 10 (b). Petitioner, indeed, concedes that these powers are applicable to charges of violation of Section 8 (b) (4) (D) as well as to all other charges. Petitioner argues only that although an investigation of the charges may, and indeed must, be conducted for the purpose of determining whether a complaint should issue under Section 10 (b) or an injunction should be sought under Section 10 (l), the investigation can have no bearing upon whether the charges warrant proceeding under Section 10 (k). This argument rests upon the same fal-

lacious assumption, discussed above, that Section 10 (k) creates an independent procedure, entirely unrelated to the prevention of unfair labor practices.

Moreover, since, as the court below pointed out (R. 26), "A mere charge of an 8 (b) (4) (D) violation does not operate to give verity to the existence of such an unfair labor practice", to preclude the Board from conducting an investigation for the purpose of determining whether to proceed to a 10 (k) hearing would in effect remove the statutory limitation which restricts the Board to determination of those jurisdictional disputes which have given rise to unfair labor practices. As the court below held, to give effect to this limitation (R. 26), "before the Board may proceed to a hearing it must determine whether in fact the dispute does give rise to the 8 (b) (4) (D) violation, and, in order to make this determination, it must conduct a preliminary investigation. This is the only rational construction that can be made of the language of Section 10 (k) itself."

3. Petitioner's contention that by permitting the Board to refuse to hear and determine a jurisdiction dispute where preliminary investigation discloses no *prima facie* evidence of a violation of Section 8 (b) (4) (D), the court below, in effect, has substituted for the words "Whenever it is charged", the words "Whenever it is found", is entirely without substance. The

Board's preliminary investigation does not result in a "finding" that a violation of Section 8 (b) (4) (D) has been committed. It is undertaken only to determine whether there is reasonable cause so to believe; this is the very determination which must be made before any of the other remedies for violation of Section 8 (b) (4) (D) (Sections 10 (b) and 10 (l) may be invoked. Only if the 10 (k) remedy does not terminate the unfair labor practice does the Board conduct a hearing and determine whether the violation of 8 (b) (4) (D) alleged has actually been committed.[4]

4. Equally insubstantial is petitioner's contention that the holding of the court below in effect nullifies the mandatory character of the language of Section 10 (k), which not only empowers but "directs" the Board to hear and determine jurisdictional disputes which come within that

[4] The excerpt from the Board's decision in *Moore Drydock Co.*, 81 NLRB 1108, quoted by petitioner (Br., p. 10), is plainly consistent with the foregoing. The Board's statement that "the word 'charged' is suggestive of an allegation rather than a finding or determination" was made in answer to the union's contention that, "in the absence of a prior unfair labor practice *finding* the Board is unable to proceed under Section 10 (k)." As such, it means only that a formal finding by the Board, pursuant to the "full dress" procedure specified in Sections 10 (b) and (c), is not required before 10 (k) becomes operative. It has no bearing whatever on the further question of whether, assuming a finding is unnecessary, a *prima facie* case in support of the charge must nevertheless be shown. See also, *Ship Scaling Contractors Assn.*, 87 NLRB, No. 14, 25 LRRM 1086, 1088 (November 18, 1949).

Section. As the court below pointed out (R. 30): "the mandate [becomes operative] when a *prima facie* case is established though not until then. Congress could not have intended otherwise."[5]

5. Between August 22, 1947, and February 28, 1950, 173 charges alleging violation of Section 8 (b) (4) (D) were filed with the Board. Of these, 131 were disposed of without formal hearing under Section 10 (k). Of the parties involved, petitioner alone has challenged in the courts the Board's power to protect its processes from abuse by conducting preliminary investigations before proceeding to a Section 10 (k) hearing.

Indeed, this action was instituted in the District Court only after the Joint Congressional Committee created by the Labor Management Relations Act heard and evidently rejected petitioner's complaint that in so proceeding the Board was exceeding its powers under the Act. (See R. 31–32.)

CONCLUSION

The decision below is clearly correct[6] and presents no substantial question warranting re-

[5] The Board has construed the language of Section 10 (k) as requiring it to hold a 10 (k) hearing whenever preliminary investigation reveals that a charge of Section 8 (b) (4) (D) violation has *prima facie* support. See *Moore Drydock Co.*, 81 NLRB 1108; *Juneau Spruce Corp.*, 82 NLRB 650; *Ship Scaling Contractors Assn.*, 87 NLRB No. 14.

[6] Since the Board's interpretation of Section 10 (k) was upheld, it follows that the complaint in the District Court

view. No conflict of decisions is shown; indeed, the contentions here advanced by petitioner have not even been urged in any other case. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

PHILIP B. PERLMAN,
Solicitor General.

ROBERT N. DENHAM,
General Counsel,

DAVID P. FINDLING,
Associate General Counsel,

A. NORMAN SOMERS,
Assistant General Counsel,

NORTON J. COME,
Attorney,
National Labor Relations Board.

JUNE 1950.

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failed to state a cause of action. The conclusion that the District Court was also without jurisdiction of the subject matter of the action follows from the fact that, assuming the Board's interpretation of Section 10 (k) to be valid, the case reduces itself to an attempt to obtain review of a determination made by the General Counsel and his agents in the course of a preliminary investigation under Sections 3 (d) and 10 (b). It is well settled that such determination is a matter of administrative discretion, unreviewable by the courts. *Lincourt* v. *National Labor Relations Board*, 170 F. 2d 306 (C. A. 1); *General Drivers, Etc.* v. *National Labor Relations Board*, 179 F. 2d 492 (C. A. 10); cf. *Ewing* v. *Mytinger & Casselberry, Inc.*, No. 568, Oct. Term, 1949, decided May 29, 1950.

APPENDIX

The relevant provisions of the Labor Management Relations Act, 1947 (Act of June 23, 1947, C. 120, 61 Stat. 136, 29 U. S. C., Supp. II, Secs. 141 *et seq.*) are as follows:

TITLE I — AMENDMENT OF NATIONAL LABOR RELATIONS ACT

SEC. 101. The National Labor Relations Act is hereby amended to read as follows:

* * * * *

"NATIONAL LABOR RELATIONS BOARD

"SEC. 3. * * *

"(d) There shall be a General Counsel of the Board who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than trial examiners and legal assistants to Board members) and over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10, and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law.

* * * * *

"UNFAIR LABOR PRACTICES

"SEC. 8. * * *

"(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * * *

"(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is:

* * * * * *

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work: *Provided,* That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act;

* * * * * *

"PREVENTION OF UNFAIR LABOR PRACTICES

"SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor

practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * *

"(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided,* That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other

person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U. S. C., title 28, secs. 723–B, 723–C).

"(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *

* * * * *

"(j) The Board shall have power, upon issuance of a complaint as provided in subsection (b) charging that any person has engaged in or is engaging in an unfair labor practice, to petition any district court of the United States (including the District Court of the United States for the District of Columbia), within any district wherein the unfair labor practice in ques-

tion is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

"(k) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (D) of section 8 (b), the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

"(l) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (A), (B), or (C) of section 8 (b), the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any

district court of the United States (including the District Court of the United States for the District of Columbia) within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: *Provided further,* That no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period. Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony: *Provided further,* That for the purposes of this subsection district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members. The service of legal process upon such officer or agent shall constitute service upon the labor organization and

make such organization a party to the suit. In situations where such relief is appropriate the procedure specified herein shall apply to charges with respect to section 8 (b) (4) (D)."

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